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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 1003

HYMAN WAINER, LOUIS WAINER, GEORGE DAVIS, DONALD BLINK, AND ED. LUECK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the District Court. Its charge to the jury appears at R. 117–126. The opinion of the Circuit Court of Appeals (R. 153–159) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 20, 1936 (R. 159–160). A petition for rehearing was denied April 17, 1936 (R. 175). The petition for writ of certiorari was filed May 8, 1936. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Rule XI of the Rules of Practice and Procedure after Plea of Guilty, Verdict, or Finding of Guilt in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

I. Whether a special plea in bar to the first count of the indictment was properly overruled.

II. Whether the admission of the statement of a co-conspirator constituted reversible error.

III. Whether the records of certain civil actions were properly admitted in evidence.

IV. Whether there was sufficient proof that the seized liquor was illicit and non-tax-paid to warrant conviction.

V. Whether certain requested instructions as to the effect of the abandonment of a conspiracy were properly refused.

Petitioners also urge that Section 193, Title 26, U. S. C. A., charged in the second count of the indictment to have been violated, was repealed by the National Prohibition Act and was not reenacted, and that Section 404, Title 26, U. S. C. A., charged in the third count to have been violated, applies solely to licensed distillers and bonded warehousemen. The Government contends that these questions, not having been properly raised in either of the courts below, should not be considered here.

STATEMENT

Petitioners were indicted, with a number of others, on May 4, 1934, in the United States District Court for the Eastern District of Wisconsin on four counts of an indictment charging, in the first count, a conspiracy to violate Sections 281, 282, 290, 193, 284, 306, 307, 328, and 1181, Title 26, U. S. C. A., and to defraud the United States, by setting up stills without being registered as required by law, by engaging in the business of a distiller, rectifier, and wholesale liquor dealer without complying with the law with respect to the filing of bonds, obtaining permits, and paying taxes, and by violating the Internal Revenue laws in many other particulars. The second count charged petitioners with unlawfully carrying on the business of a wholesale liquor dealer without paying the special tax required by law. (Sec. 193, Title 26, U. S. C. A.) The third count charged them with unlawfully concealing and aiding in the concealment of alcohol on which the tax had not been paid and which had been removed to a place other than the bonded warehouse provided by law (Sec. 404, Title 26, U. S. C. A.), and the fourth count charged the removal and transportation of 1,650 gallons of alcohol with intent to defraud the Government of the tax thereon (Sec. 1181, Title 26, U. S. C. A.). (R. 2–9.)

A special plea in bar to the first count of the indictment was filed and overruled (R. 10–19).

Petitioners were convicted on all counts of the indictment (R. 24) and, after a motion for a new trial was overruled (R. 31), were sentenced as follows: The two Wainers were each given a total term of imprisonment of six years and a total fine of $12,100. Petitioners Davis and Blink were each sentenced to three months' imprisonment and fined $100, and petitioner Lueck to six months' imprisonment and $100 fine. (R. 32–33.) Upon appeal the convictions were affirmed (R. 159–160) and a petition for rehearing denied (R. 175).

A brief summary of the Government's evidence shows that petitioners Hyman Wainer and Louis Wainer maintained an office for a cattle and hide business in New London, Wisconsin, which office was used in connection with their wholesale operations in the illicit liquor traffic. They also maintained in New London and vicinity places for the storage, canning, "cutting" and sale of illicit and non-tax-paid alcohol. Among such places were the Ford garage (R. 72–73), the Buick garage (R. 70–71), the rear of Rusch's Service Station (R. 55–57), all in New London; a farm several miles north of New London, known as the Rossi farm (R. 60–62, 64); the Fuhrman home (R. 55); a house owned by defendant Wallmer and occupied by petitioner Louis Wainer where Government officers found a rectifying or cutting plant (R. 76–78); and the so-called guinea pig farm near Oshkosh, Wisconsin (R. 57).

Stills were maintained by the conspirators in various parts of the Eastern District of Wisconsin, from which stills the manufactured alcohol was hauled to New London or vicinity in fifty 5-gallon drums and at the various places named above was "cut" and run off into 1-gallon tin cans (R. 55–56, 82), in which containers it was sold to customers in Wisconsin, Minnesota, Illinois, and the Dakotas in automobile lots of 700 gallons, or more, per load (R. 58, 70). When a customer called for alcohol at one of the garages his car was taken by a defendant employee, sometimes at the instruction of petitioner Hyman Wainer (R. 79), to an alcohol storage place, where it was loaded by other defendants and returned to the garage, the load being covered and concealed, and after nightfall it was driven away by the purchaser (R. 57–58, 70).

In 1932 petitioners Hyman Wainer and Lueck made arrangements for the unloading and storing of corn sugar in carload lots at the Supple Fuel and Building Material Company's yards in Fond du Lac and also for the purchase of large quantities of coke. The corn sugar and coke were hauled away by their men, one of them being petitioner Davis. The amount of sugar averaged about 4 freight car loads a week and the coke a load or two each day, sometimes 7 or 8 tons at a time. (R. 47.) Later petitioners Hyman Wainer and Lueck purchased from the Supples three lots adjoining the Supple warehouse, saying it was a good location for

a plant as a nearby tannery and marsh would prevent the smell of mash. Lueck introduced Hyman Wainer as "the boss" and at their request the name "Balsam" was inserted in the deed as the grantee. (R. 47–48.) A building was constructed on these lots and soon thereafter a large distillery was discovered in the course of erection thereon (R. 45–46).

Among other large stills operated by the conspirators was one at Appleton, Wisconsin, to which about 275,000 pounds of corn sugar were delivered in one week in 1933. Sugar was hauled from the railroad at New London, Appleton, Butler, and Milwaukee directly to the stills located at the Litman farm, in Shawano County, the Perky farm, near Hollister, and in the Graff building, in Appleton. (R. 54, 83–85.)

About a month before the return of the indictment a search warrant was executed on the residence of petitioner Louis Wainer, at New London, where the officers found an illicit rectifying or cutting plant with considerable apparatus in the basement of the building. A large quantity of alcohol in gallon cans, rye residue and various brands of whiskey, some genuine and others contraband, were found. (R. 76–78.)

ARGUMENT

I

Petitioners Hyman Wainer and Davis contend that their special plea in bar to the first count of

the indictment should have been allowed, because it asserted their prior conviction under the National Prohibition Act on an indictment showing that the offenses in that and in the present indictment were identical in time, place, and transaction, and that under Section 5 of the Willis-Campbell Act (Sec. 3, Title 27, U. S. C.) they were immune from further prosecution.

In their plea in bar (R. 11) the above petitioners alleged that they had been previously prosecuted for the same acts at the same place involving substantially the same time under an indictment which was returned, as they alleged, in May 1932, in the Eastern District of Wisconsin. The certified copy of the indictment attached to their plea (R. 13–19) shows that it was returned in the Western District of Wisconsin in the December Term, 1931. Not only did the plea not aver that the court for the Western District of Wisconsin had jurisdiction of the parties or the subject matter, but a comparison of the two indictments clearly shows that the offenses were not identical.

To support a plea of former conviction the offenses must be the same in law and in fact. *Burton* v. *United States,* 202 U. S. 344, 380; *Gavieres* v. *United States,* 220 U. S. 338, 343. Only two of the present petitioners, namely, Hyman Wainer and Davis, were included in the former indictment. It charged a conspiracy to violate the National Prohibition Act, while the

indictment in the instant case charged a conspiracy to violate the Internal Revenue laws and to defraud the United States. The former charged the above petitioners with conspiring with many persons specifically named therein who were not co-conspirators or defendants in the present indictment. It set forth 31 overt acts (R. 15–19), all committed in the Western District of Wisconsin, by specifically named persons, none of whom were defendants in the present indictment, and all of which overt acts, the indictment alleged, were committed in violation of the National Prohibition Act.

In point of time of the commission of the offenses the two indictments differ. The former charged a conspiracy "on or about the 1st day of August, 1928, and thereafter continuously from that date to on or about the first day of April, 1932" (R. 14), while the indictment to which the special plea in bar was interposed alleges the existence of a conspiracy from July 1, 1925, up to the date of the return of the indictment, namely, May 4, 1934 (R. 2), a date long after the conviction of the petitioners in the Western District and more than two years after the date of the last overt act set forth in the indictment in that district.

The record shows many acts committed by petitioners after April 1, 1932, the last date charged in the indictment in the Western District, namely, in the latter part of 1932 and in 1933 and 1934 (R.

47–48, 52–53, 59, 64, 67, 72, 75–76, 83–86), all of which were in furtherance of the conspiracy to violate the Internal Revenue laws and to defraud the Government. As these acts were all subsequent to the conviction in the Western District they could not have been in pursuance of the conspiracy charged in that district, and many of them could not possibly have been in pursuance of that conspiracy, since the National Prohibition Act was no longer in existence at the time of the commission of these acts.

We submit that the foregoing shows conclusively the existence of a conspiracy to violate the Internal Revenue laws separate and distinct from the conspiracy to violate the National Prohibition Act charged in the former indictment, and that the court below correctly held that the plea in bar was properly overruled.

United States v. *LaFranca,* 282 U. S. 568, and *Ex parte Nielsen,* 131 U. S. 176, relied on by petitioners, are not in point, since there was here no identity of offenses or transactions.

II

Petitioners complain of the admission in evidence as against them, and without immediately and specifically limiting its application to the defendant making it, of the statement of Al Tessen (R. 89–92), a co-conspirator, alleged to have been made after the termination of the conspiracy and by way of narration of past events.

The statement was signed by defendant Tessen on May 4, 1934, the date the indictment was returned. The petitioners objected to its admission so far as it involved any other defendant than Tessen. The court ruled that the statement was admissible as one made by a defendant and that it was received as such, stating that as to defendants other than the one making it the statement was received "with an appropriate instruction with respect to it." Thereupon the petitioners excepted to the admission of "the statement itself" (R. 93). The trial lasted several days and in its final charge the court omitted any reference to the limitation of the statement, although it did charge generally that the acts or statements of individual defendants were not to be considered by the jury as affecting any other defendants "unless you find from the evidence the existence of such conspiracy, that such other defendant was a member thereof and that the acts were done and such declarations were made in pursuance of the common purpose, set out in the indictment, to effectuate the same" (R. 120). No amplification of this charge was requested and no instructions were asked to limit the application of the statement, nor was there any exception taken to the court's charge on the ground that it failed specifically to limit the application of the statement to the defendant making it.

The court below held that the statement was clearly admissible as against Tessen, but that it

could not be considered so far as the other defendants were concerned, unless it was made in furtherance of the conspiracy and before the termination of the same. It then said (R. 155–156):

> This fact the court recognized when admitting the statement, but appellants may not neglect their opportunity to request a specific charge as to the effect of any particular evidence and then profit by said neglect when the court can no longer comply with the request. Having neither excepted to the failure of the court to give a specific charge nor having offered or requested any such charge, the court cannot be charged with error. The fault lies with appellants themselves.

This, the petitioners contend, is in conflict with the court's prior decision in *Collenger* v. *United States*, 50 F. (2d) 345, where under somewhat similar circumstances it was held that when a motion is made to limit a statement received in evidence, it is the duty of the trial court promptly and specifically to limit its application to the defendant making it if found to be incompetent as to other defendants, and that it should not be left to the jury under a general charge to determine the application of the statement. In that case a number of statements were received in evidence and requests made to limit their application, and the fact that this may have been confusing and rendered it difficult for the jury to determine what statements

were made in the course of the conspiracy and to which defendants they should be limited may have influenced the decision of the court in that particular case. In any event, the mere failure of the court below to follow its prior decision affords no ground for certiorari.

The other cases relied on by petitioners do not present a real conflict, since both the trial court and the court below recognized the principle laid down therein, namely, that the acts or declarations of one conspirator, made after the conspiracy has ended and not in furtherance of the same, are not admissible in evidence against other conspirators.

Moreover, the evidence contained in the statement objected to was largely cumulative, a number of other witnesses having testified against petitioners. In view of the abundant other evidence showing petitioners' guilt they could not have been prejudiced by its admission.

III

Petitioners further complain of the admission in evidence of the records of two civil actions brought in a State court against the Wainers.

These records were offered in corroboration of the testimony of four or five witnesses who had previously testified, without objection on the part of the petitioners, to the facts contained therein, and the admission could not have been prejudicial. An Internal Revenue agent testified (R. 38–39) that he seized two large stills on the Kent

and Blink farms. Mr. and Mrs. Kent testified (R. 39–42) that they had leased the farm on which the still was found to the Wainers; that after the raid they made demand on the Wainers for damages to the barn resulting from the installation of the illicit still, and that when the demand was not satisfied they brought suit and recovered a judgment for $500, which was paid. Albert Blink testified (R. 42–43) that he had leased the farm on which the still was found by the revenue agent to the Wainers and brought suit against them for similar damages to his barn. The suit was settled for $130 and dismissed. John Morgan, attorney for Blink, testified (R. 43–44) to the filing and settling of the suit. In corroboration of these witnesses the clerk of the court was called to produce the records showing the commencement and termination of the suits as verbally testified to by the foregoing witnesses. When offered in evidence the petitioners objected to the *materiality* of the records, except as to "the satisfaction of the settlement of the claim" (R. 44). In overruling the objection the trial court stated: "I suppose if the plaintiff offered part you would have a right to insist upon the whole record. It may be received" (R. 45). Thus, the objection was directed merely to the materiality of the records and was made only to those portions which did not involve the satisfaction of the settlement, which satisfaction petitioners on cross-examination of attorney Morgan had previously introduced in the case.

In *United States* v. *Satuloff Bros.*, 79 F. (2d) 846 (C. C. A. 2d) relied on by petitioners as showing a conflict, a judgment in a civil suit was offered in support of a motion to quash an indictment. Here the records in the civil suit were offered in corroboration of the Government's witnesses and not as direct evidence or proof of the petitioners' guilt. The records disclosed nothing that had not previously been testified to without objection. The case relied on presents no such conflict as to warrant certiorari.

IV

Petitioners also contend that their convictions cannot be sustained because there was no proof offered by the Government to show that the liquor involved was not tax-paid and they rely on *Mickle* v. *United States*, 33 F. (2d) 684, (C. C. A. 8th), as showing that such proof is necessary.

While there may have been no direct proof that the taxes were not paid, the whole of the Government's case proceeded on the theory that the liquor dealt in by petitioners was non-taxpaid. The very purpose of the transactions was to defraud the Government of the tax on the liquor, and the jury by its verdict must have so found. If the taxes were paid the petitioners could have readily shown that fact. Cf. *Rossi* v. *United States*, 289 U. S. 89, 91. The point now made does not appear to have been raised in the trial court or in the assignment of errors in the appellate court. The

trial court, at the Government's request, charged the jury that the burden was not on the Government to prove failure to pay taxes (R. 126). No exception was taken to these instructions. Petitioners should not now be heard to complain that the Government has not sufficiently proved one element of its charges.

V

Complaint is further made of the refusal of the trial court to grant petitioners' requested instructions with respect to the effect of the abandonment of a conspiracy by one of its members.

It does not appear that this instruction would have been proper. The defense was a general denial of all charges. The testimony of the petitioners who took the stand, and of others who testified in their behalf, was to the effect that they knew nothing of the conspiracy and had committed no acts in furtherance thereof. The question of abandonment was in no way in issue. The court charged that before there could be a conviction the jury must find that a conspiracy existed within three years prior to May 1934, the period covered by the indictment (R. 121); that the jury's next inquiry should be which of the defendants on trial was a party to the conspiracy (R. 123), adding, for the further guidance of the jury, "the one thing that you must direct your attention to is whether the particular defendant, any particular defend-

ant, consciously, understandingly, and with knowledge participated in an act which was an act to be accomplished by the conspiracy, and he did it with the consciousness that, as such, he was participating in the furtherance of the common design" (R. 123).

The court below held (R. 158) that the inevitable meaning of this charge was that, before a defendant could be convicted, the proof must show that he was consciously engaged in the conspiracy charged within three years prior to the return of the indictment. Petitioners contend that such is not the inevitable meaning of the charge; that it is a charge upon the participation in, rather than the abandonment of, a conspiracy, and that it is not an understandable instruction of the law affording an adequate guidance for the jury. We submit that under the pleadings and evidence the requested instructions were properly refused and that the instructions given adequately protected the rights of petitioners.

VI

The contention is sought to be made that Section 193, Title 26, U. S. C. A., providing for a special tax for wholesale liquor dealers, and charged to have been violated in the second count of the indictment, was repealed by the National Prohibition Act and was not reenacted by Section 3, Title 27, U. S. C. (Section 5 of the Willis-Campbell Act); and that Section 404, Title 26, U. S. C. A., prohibiting the re-

moval and concealment of distilled spirits contrary to law, and on which convictions were sustained under the third count of the indictment, is applicable only to licensed distilleries and their established warehouses.

We submit that the petitioners are in no position to make these contentions. The record does not disclose that they were raised in or passed upon by either court below. Reference is made to them in the petition for rehearing (R. 171–173), denied without opinion, where it is claimed the points were presented in petitioners' briefs filed in the court below and complaint is made that the court ignored them. If the questions were raised in the appellate court for the first time the action of the court was proper. The questions, not having been properly raised in the courts below, should not be considered here, especially on the abstract proposition suggested by petitioners, namely, that this Court should construe the statutes and clarify their applicability. See *Gila Valley Ry. Co.* v. *Hall,* 232 U. S. 94, 98–99; *McCarthy* v. *Arndstein,* 262 U. S. 355, 360; *United States* v. *La Franca,* 282 U. S. 568, 576–577. The present contentions of the petitioners are obviously an afterthought. They are clearly not in a position to seek the setting aside of verdicts against them upon grounds which were not properly raised below and which, presenting questions of statutory construction, obviously do not involve plain errors. Cf. *United States* v.

Atkinson, No. 265, present term, decided by this Court February 3, 1936.

CONCLUSION

The case was correctly decided below and there is no such conflict of decisions as to warrant further review by this Court. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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